FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,

Appellants,

—v.—

STATE BAR OF ARIZONA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

REPLY BRIEF FOR THE APPELLANTS

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Statutes and regulations:

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ARGUMENT

Appellee's brief exudes a sincere respect for the legal profession which appellants share. It is by no means true, however, and it most certainly has

not been demonstrated, that the existence of advertising will lead to a loss of the service-orientation of the profession or will interfere with other public values of professionalism. Providing the public with easy access to needed information regarding the availability and cost of legal services is in the best tradition of the profession. Subsequent decisions accord with the view set forth in appellants' brief that the public interest is better served by broad dissemination of information about individual practioners than by the suppression of it.

On December 15, 1976, a three-judge federal court decided Consumers Union of United States, Inc. v. American Bar Association, Civ. Act. No. 75-0105-R, BNA Antitrust & Trade Reg. Rptr., No. 795 (E.D. Va.). That case arose from an attempt by Consumers Union to produce a directory of legal services containing information elicited from individual attorneys, including their office location, education, areas of specialization, fees and billing practices. The furnishing of such information by attorneys was

prohibited by Disciplinary Rules 2-101 and 2-102, originated by the American Bar Association and adopted by the Supreme Court of Virginia.[1] A majority of the court held that the prohibition against publication of non-fee information or information regarding fees for initial consultation violated the First Amendment.

On the question of the publication of fees for specific legal services, the court split.[2] Judge Merhige ruled that for at least some services, publication of fees would be protected:

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[1]The Supreme Court of Virginia had rejected recent amendments adopted by the American Bar Association which permit certain types of advertising in telephone directories or directories published by bar associations. See Appellants Brief, p. 14, n. 3. The rules in effect in Virginia were accordingly identical in their operative effect to the Arizona rules involved in the present case.

[2]Circuit Judge Bryan dissented on the ground that the suit should be dismissed from federal court on grounds of comity; he accordingly did not reach the merits at all.

> There are...legal services that are, in the author's view, sufficiently standardized to permit accurate characterizations in a directory. An initial consultation, an ordinary residential real estate conveyance, an uncontested divorce, a standard lease and a change of name proceedings, are examples which quickly come to mind, and all of the problems presented therein can be handled by an attorney in committing an amount of time and expertise that is not greatly variable from case to case. If the service itself is adequately specified, and standardized, a fee statement is not misleading.

(Slip. Op. p. 30; footnotes omitted).

Judge Warriner dissented on this point, contending that specific services varied so much that publication of a fee was misleading.

Appellants, of course, concur in the position of Judge Merhige that the advertisement of fees for standardized services is constitutionally protected. In addition, even if varying amounts of time and expertise are required for the performance of a particular service,

publication of a set fee is not misleading if the service is competently performed for the advertised fee. See Appellants' Brief, pp. 17-18, 43-44. And fee information is particularly entitled to constitutional protection. Id. at pp. 31-34; cf. United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971). But in any event, the decision in Consumers Union provides support for striking down Disciplinary Rule 2-101(B) as overbroad, for the rule prohibits publication of non-fee information that both judges in the majority agree is protected by the First Amendment.[3]

An even stronger conclusion was reached unanimously by a three-judge court in Health Systems Agency of Northern Virginia, Inc. v. Virginia State Board of Medicine, Civ. Act. No. 76-37-A, BNA Antitrust & Trade Reg. Rptr. No. 789, p. D-1 (E.D. Va.; Nov. 9, 1976). There the court held that physicians were protected by the First Amendment from being disciplined for furnishing information for a consumers' medical services

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[3] See also Population Services International v. Wilson, 398 F. Supp. 321 (S.D.N.Y. 1975), prob. jur. noted, 96 S. Ct. 2621 (1976).

directory that set forth individual physicians' fees for routine office and hospital visits and for certain laboratory tests, along with information regarding office hours, billing practices and other matters.[4] The court ruled that the constitutional interest in free dissemination of information as exercised in publication of the directory outweighed the asserted state needs to prevent fraudulent or deceptive practices and to prevent unwitting misuse by the public of truthful information.

The balance struck by these decisions casts grave doubt upon appellee's assumptions that advertising will cause the virtual destruction of the legal profession. So does the recent action of the District of Columbia Bar Association in proposing amendments to the Code of Professional Responsibility which would permit advertisement of fee information

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[4]The statute of which enforcement was enjoined by the court, Virginia Code § 54-317, forbade physicians to advertise "...professional services, their costs, prices, fees, credit terms or quality."

by individual attorneys.[5] (Amicus Brief of United States, App. p. 20a). Similarly, the suggestion in appellee's brief (pp. 45-46) and that of the American Bar Association (pp. 29-30) that the states should be free to experiment with varying degrees and types of restrictions tends to refute the contention that an overwhelming public interest requires the suppression of all public commercial speech by individual attorneys.

The remaining contentions of appellee are adequately met in appellants' original brief, and that ground will not be re-covered here. At one point, however, appellee's brief (p. 37) states that the divorce price of $175 advertised by appellants is in some cases excessive. This conclusion is based solely on the

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[5]The proposed District of Columbia amendments would prohibit varieties of false or deceptive advertisement, which are not protected. See Young v. American Mini Theatres, Inc., 96 S. Ct. 2440, 2451 (1976). Counsel for appellee has asked us to note that he will refer to Young, which was not cited in his brief, in oral argument.

statement of Justice Gordon of the Supreme Court of Arizona, concurring, that he is "able to foresee instances in which the $175.00 fee quoted for this service would be unreasonably high." (Jur. St. App. p. 12a). This observation was not offered as a finding, nor could it have been, for there is absolutely nothing in the record to suggest that appellants' fees were in fact too high for any service rendered. Appellants doubt that uncontested divorces can economically be offered in their community for less than $175, but if some attorney is able to organize his practice in such a way as to provide competent divorce services for $150, then let him advertise that fact and the public will benefit even more than they do from appellants' services. That point is the crux of this case, with regard to both the First Amendment and the antitrust laws.

A final word must be addressed to the position of the United States in regard to the applicability of the Parker v. Brown "state action exemption" from the antitrust laws. While not disputing the private origination of Disciplinary

Rule 2-101(B), the Government has concluded that adoption and enforcement of the Rule by the Arizona Supreme Court places it beyond the scope of the antitrust laws. (Brief of United States, pp. 15-21). The difficulty with this position is that it requires one to ignore much of what this Court said and did in Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976). In rejecting the argument that the antitrust laws ought not to apply to industries pervasively regulated by the states, this Court said that "even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's...." 96 S. Ct. at 3119. The Court went on to state:

> ...[A]ssuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.
>
> The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining

> that exemption was necessary in order to make the regulatory act work, "and even then only to the minimum extent necessary."

Id. at 3120 (footnote omitted). The Court concluded that even if the antitrust laws outlawed Detroit Edison's light bulb exchange program, "there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively." Id. This conclusion did not turn on any distinction between legislative and administrative state action.

The Government's approach dispenses with the need for all this examination of the character of the restraint and its importance to the state regulatory scheme; it is enough if the state promulgates and enforces the restriction. (Brief of the United States, pp. 15-21). Nor is there any room for consideration of the degree to which the restraint frustrates federal antitrust policy. The question is settled for the Goverment when it determines that the state really intended to give effect to the restraint. As a result, the states are

given much wider latitude in creating implied exemptions to the antitrust laws than is Congress. This is not the rule of Cantor, but the Government has apparently not acquiesced in Cantor.

Appellants suggest that Cantor does control, and that by its tests Disciplinary Rule 2-101(B) cannot stand. The prohibition of advertising is not essential to the Arizona Supreme Court's regulation of the practice of law, and it frustrates the competitive goals of the antitrust laws without substituting any compensating rate regulation. The state is not entitled to compel private conduct in violation of the antitrust laws. Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951). Disciplinary Rule 2-101(B) consequently conflicts with the Sherman Act.

CONCLUSION

For these and the other reasons set forth in appellants' original brief, the decision of the Supreme Court of Arizona should be reversed.

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